

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

USGEN NEW ENGLAND, INC., a subsidiary
of NATIONAL ENERGY & GAS & GAS
TRANSMISSION, INC. f/k/a PG&E
NATIONAL ENERGY GROUP, INC.,

Plaintiff,

v.

BENTLY NEVADA, LLC f/k/a BENTLY
NEVADA CORPORATION, LLC; AND
BENTLY PRESSURIZED BEARING
COMPANY f/k/a BENTLY NEVADA
CORPORATION,

Defendants.

Civil Action No. 04 CV 12629 RWZ

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR REMAND TO STATE COURT**

Plaintiff, USGEN New England, Inc., a subsidiary of National Energy & Gas and Gas Transmission, Inc., f/k/a PG&E National Energy Group, Inc. ("USGEN"), submits this memorandum in support of its motion for remand of this action to the state court from which it was removed.

Statement of Relevant Facts¹

Background

USGEN filed Plaintiff's Original Complaint (the "Complaint") in Essex Superior

¹ This Statement of Relevant Facts is based on and supported by the plaintiff's Complaint and the Declaration of Kathleen A. Kelley ("Kelley Dec."), which declaration is attached hereto as Exhibit A.

Court on November 6, 2004. By way of the Complaint, USGEN seeks recovery for damages suffered as a result of defective product and/or services provided by the defendants. The Complaint was served on defendant Bently Pressurized Bearing Company on November 15, 2004, and on defendant Bently Nevada, LLC on November 18, 2004. (Kelley Dec. at ¶ 3.)²

The Removal

On or about December 17, 2004, a Notice of Removal was entered on the docket of this Court. The date stamp on that Notice of Removal was December 16, 2004. (Kelley Dec. at ¶ 6, Ex. 1.)³ In those removal papers, the defendants aver that:

1. “there exists complete diversity of citizenship between the Plaintiff and the Defendants.” (Notice of Removal at ¶ 5.)

2. “Plaintiff is a foreign corporation organized under the laws of the state of Delaware . . .” (*Id.* at ¶ 6.)

3. “Bently Nevada LLC, f/k/a Bently Nevada Corporation, LLC [hereinafter “Bently Nevada”] is a foreign limited liability company with a principal place of business at 1631 Bently Parkway South, Minden, Nevada, and authorized to do business in Massachusetts. (*Id.* at ¶ 7.)

² The defendants' answers to the Complaint were therefore due to be filed on December 6 and 8, 2004, respectively. On or about December 6, 2004, the undersigned received a telephone call from Joseph Valle, counsel for the defendant(s). Mr. Valle requested an extension to December 27, 2004 to answer the Complaint. On or about December 7, 2004, the undersigned granted Mr. Valle an extension to and including December 22, 2004 to respond to the Complaint. (Kelley Dec. at ¶¶ 4-5.)

³ The defendants apparently omitted the Category Sheet from the December 15, 2004 filing, which Category Sheet was not filed until the next day. The clerk held the materials submitted on December 15 until he received the Category Sheet. (Kelley Dec. at ¶ 7.)

4. “Bently Pressurized Bearing Company, f/k/a Bently Nevada Corporation, is a foreign corporation organized under the laws of the state of Nevada, and authorized to do business in Massachusetts.” (Id. at ¶ 8.)

No member of the limited liability company Bently Nevada id identified. (Id. at ¶ 6.)

On or about December 16, 2004, the defendants mailed a Notice of Filing of Notice of Removal to Essex Superior Court. That Notice was docketed by the Essex Superior Court on December 21, 2004. (Kelley Dec. at ¶ 8, Ex. 2, 3.)

II. Argument

THE REMOVAL IS IMPROPER

A. The Standard

“Because removal raises significant federalism concerns, the removal statutes must be strictly construed.” Shamrock Oil and Gas Corp. v. Sheets, 313 U.S. 100, 108-109 (1941). See also 14A C.A. Wright, A.R. Miller, and E. H. Cooper, Federal Practice and Procedure; Jurisdiction 2d, § 3733 (remand of removed case appropriate where federal jurisdiction is not absolutely clear). Strict construction is particularly important in cases removed on diversity grounds: The removing party must clearly establish that complete diversity between and among the parties existed at the time of removal. See, e.g., Danca v. Private Health Care Systems, Inc., 185 F.3d 1, 4 (1st Cir. 1999). If the district court is unable to determine its own subject matter jurisdiction from the papers on file, the case should be remanded to the state court from which it was removed. See, e.g., id.

A decision to remand an action to state court is generally not appealable. (See, 28 U.S.C. § 1447(c).

B. This Case Must Be Remanded

1. Jurisdiction Is Not Established

For purposes of diversity jurisdiction, a limited liability company is a citizen of the state or states of which its members are citizens. See, e.g., JMTR Enterprises, LLC v. Duchin, 42 F. Supp. 2d 87, 93 (D. Mass. 1999). It is impossible to determine the citizenship of Bently Nevada from any papers on file in this matter, because nowhere are the members of Bently Nevada -- a limited liability company -- identified. See, e.g., id. (must be able to determine citizenship of all members to determine citizenship of limited liability company). “Defendant[s] must make an affirmative showing of all of the requisite factors of diversity jurisdiction” that do not appear in the pleadings. See 14A C.A. Wright, A.H. Miller, and E.H. Cooper, Federal Practice and Procedure: Jurisdiction 2d, § 3733 at 533 n. 4 (2d ed. 1985) (2001 supp.) (citing Gaitor v. Penninsular & Occidental S.S. Co., 287 F.2d 252 (5th Cir. 1961) (emphasis added)). See also Danca, 185 F.3d at 4.

Defendants have attempted to remove this action from the state court forum chosen by the plaintiff without conclusively (or at all) establishing the jurisdiction of this Court to receive the case. On that basis alone, this case should be remanded to Essex Superior Court. See, e.g., Danca, 185 F.3d at 4.

2. In Any Event, Removal Was Untimely

The required strict construction of the removal statute extends to the consideration of whether the acts required to be done to effect removal were done in a timely fashion. See, e.g., id. Here, the defendants clearly did not complete the actions necessary to remove this case from state court on or before December 15, 2004, as required: (1) The filing of the Notice of Removal

in the federal court was not complete until December 16, 2004, when the defendants filed the Category Sheet with the clerk, and (2) the notice of the removal to the state court was not complete until December 21, 2004, when the clerk in that court received the mailed Notice of Notice of Removal. The removal, therefore, was not effected until December 21, 2004, six days too late. See, e.g., Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 841-42 (1st Cir. 1988) (removal not effected until last act required by the statute is completed).

This case should therefore be remanded.

CONCLUSION

For the foregoing reasons, the instant action should be remanded to Essex Superior Court, the state court from which it was removed.

Dated: January 14, 2005

Respectfully submitted,

USGEN NEW ENGLAND, INC.

s/Kathleen A. Kelley

Kathleen A. Kelley

BBO No. 562342

HARE & CHAFFIN

160 Federal Street

Boston, MA 02110

Tel. 617-330-5000

and

Brook F. Minx

Texas Bar No. 00789905

William T. Sebesta

Texas Bar No. 00784941

DONATO, MINX and BROWN

3200 Southwest Freeway – Ste. 2310

Houston, TX 77027-1112

Tel. 713-877-1111

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

USGEN NEW ENGLAND, INC., a subsidiary
of NATIONAL ENERGY & GAS & GAS
TRANSMISSION, INC. f/k/a PG&E
NATIONAL ENERGY GROUP, INC.,

Plaintiff,

v.

BENTLY NEVADA, LLC f/k/a BENTLY
NEVADA CORPORATION, LLC; AND
BENTLY PRESSURIZED BEARING
COMPANY f/k/a BENTLY NEVADA
CORPORATION,

Defendants.

Civil Action No. 04 CV 12629 RWZ

**DECLARATION OF KATHLEEN A. KELLEY IN SUPPORT OF
PLAINTIFF'S MOTION FOR REMAND TO STATE COURT**

I. Kathleen A. Kelley, state, under the penalties of perjury, as follows:

1. I am an attorney, admitted to and in good standing with the bar of the Commonwealth of Massachusetts. I am co-counsel for the plaintiff in this action, USGEN New England, Inc., a subsidiary of National Energy & Gas and Gas Transmission, Inc., f/k/a PG&E National Energy Group, Inc. ("USGEN").

2. The statements contained herein are made upon my personal knowledge, unless otherwise indicated.

3. USGEN filed Plaintiff's Original Complaint (the "Complaint") in Essex Superior Court on November 6, 2004. By way of the Complaint, USGEN seeks recovery for damages

suffered as a result of defective product and/or services provided by the defendants. The Complaint was served on defendant Bently Pressurized Bearing Company on November 15, 2004, and on defendant Bently Nevada, LLC on November 18, 2004.

4. The defendants' answers to the Complaint were therefore due to be filed on December 6 and 8, 2004, respectively. On or about December 6, 2004, I received a telephone call from Joseph Valle, counsel for the defendant(s). (Mr. Valle believed, although he was not then sure, that he would be representing both entities named as defendants in the Complaint.)

5. Mr. Valle requested an extension to December 27, 2004 to answer the Complaint. On or about December 7, 2004, I granted Mr. Valle an extension to and including December 22, 2004 to respond to the Complaint.

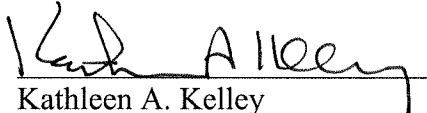
6. On or about December 17, 2004, I received, by mail, copies of the removal papers filed by the defendants. The Notice of Removal was stamped as having been filed on December 16, 2004. Attached hereto as Exhibit 1 is a true and correct copy of that stamp.

7. I spoke with the clerk at the federal court on December 17, 2004, and I was told that the defendants had filed papers on December 15, 2004, but they had omitted the necessary Category Sheet. The clerk informed me that he held the filing until December 16, 2004, when the required Category Sheet was filed by the defendants.

8. On or about December 16, 2004, the defendants mailed a Notice of Filing of Notice of Removal to Essex Superior Court. That Notice was docketed by the Essex Superior Court on December 21, 2004. Attached hereto as Exhibit 2 is a true and correct copy of the letter of defendants' counsel to the Essex Superior Court, dated December 16, 2004. Attached hereto

as Exhibit 3 is a true and correct copy of the docket sheet for this state court action, which I retrieved on-line.

SIGNED UNDER THE PENALTIES OF
PERJURY THIS 14th DAY OF JANUARY, 2005.


Kathleen A. Kelley

453001.121704

EXHIBIT 1

12/16/04

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. _____

USGEN NEW ENGLAND, INC., a
Subsidiary of NATIONAL ENERGY &
GAS & GAS TRANSMISSION, INC.,
f/k/a PG&E NATIONAL ENERGY
GROUP, INC.,

Plaintiff,

v.

BENTLY NEVADA, LLC, f/k/a BENTLY
NEVADA CORPORATION, LLC and
BENTLY PRESSURIZED BEARING
COMPANY, f/k/a BENTLY NEVADA
CORPORATION,

Defendants

04 12629 RWZ

NOTICE OF REMOVAL

RECEIPT # 60871
AMOUNT \$ 150.00
SUMMONS ISSUED N/A
LOCAL RULE 4.1 -
WAIVER FORM -
MCF ISSUED -
BY DPTY. CLK M.P.
DATE 12/16/04

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS MAGISTRATE JUDGE LPC

The Defendants, Bently Nevada, LLC, f/k/a Bently Nevada Corporation, LLC and Bently Pressurized Bearing Company, f/k/a Bently Nevada Corporation (the "Defendants") submit the following Notice of Removal pursuant to Fed. R. Civ. P. 81(c), and state as follows:

I. Introduction.

1. Plaintiff filed suit against the Defendants in a civil action entitled USGEN New England, Inc. and Gas Transmission, Inc. v. Bently Nevada, LLC, f/k/a Bently Nevada Corporation, LLC and Bently Pressurized Bearing Company, f/k/a Bently Nevada Corporation, Essex Superior Court, Civil Action No. 2004-02042-A (the "State Court Action").

2. The Defendants hereby remove the State Court Action to the United States District Court for the District of Massachusetts.

EXHIBIT 2

RIEMER & BRAUNSTEIN LLP

===== C O U N S E L O R S A T L A W =====

Three Center Plaza · Boston, Massachusetts 02108-2003

(617) 523-9000 · Fax (617) 880-3456

E-Mail firm@riemerlaw.com

Craig J. Ziady
Direct Dial: (617) 880-3442
Writer's Direct Fax: (617) 692-3442
E-Mail: cziady@riemerlaw.com

New York, New York
(212) 302-8880 · Fax (212) 789-3100
Burlington, Massachusetts
(781) 273-2270 · Fax (781) 273-0776

December 16, 2004

Civil Clerk's Office
Essex Superior Court
34 Federal Street
Salem, MA 01970
Attention: Eleni

**Re: *USGEN New England, Inc., et al*
 v. Bently Nevada, LLC, et al
 *Civil Action No. 2004-02042-A***

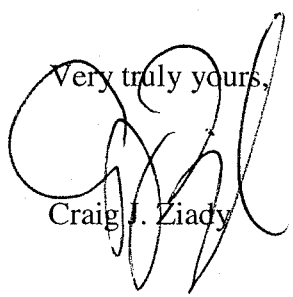
Dear Eleni:

Enclosed for filing in the above-captioned matter please find a Notice of Filing of Notice of Removal of this action to the United States District Court for the District of Massachusetts.

As you know, the Federal Court will require certified or attested copies of all records of proceedings in the above-captioned action, along with a certified copy of all docket entries. Accordingly, please also find enclosed a check in the amount of \$50.00 for the cost of obtaining such records. Please forward the certified copies to the undersigned at your earliest convenience.

Please feel free to contact the undersigned if you have any questions. Thank you in advance for your courtesy and cooperation.

Very truly yours,


Craig J. Ziady

CJZ/jec
Enclosure

cc: ✓ Kathleen A. Kelley, Esquire
 Brook F. Minx, Esquire
 William T. Sebesta, Esquire

EXHIBIT 3

**Commonwealth of Massachusetts
ESSEX SUPERIOR COURT
Case Summary
Civil Docket**

USGEN New England Inc v Bently Nevada LLC et al

Details for Docket: ESCV2004-02042

Case Information

Docket Number:	ESCV2004-02042	Caption:	USGEN New England Inc v Bently Nevada LLC et al
Filing Date:	11/08/2004	Case Status:	Disposed: transferred to other court
Status Date:	12/21/2004	Session:	Civil-CtRm 2 -rear (Salem)
Lead Case:	NA	Case Type:	Complex

Tracking Deadlines

TRK:	F	Discovery:	09/04/2005
Service Date:	02/06/2005	Disposition:	01/02/2006
Rule 15:	04/07/2005	Rule 12/19/20:	04/07/2005
Final PTC:	11/03/2005	Rule 56:	10/04/2005
Answer Date:	04/07/2005	Jury Trial:	YES

Case Information

Docket Number:	ESCV2004-02042	Caption:	USGEN New England Inc v Bently Nevada LLC et al
Filing Date:	11/08/2004	Case Status:	Disposed: transferred to other court
Status Date:	12/21/2004	Session:	Civil-CtRm 2 -rear (Salem)
Lead Case:	NA	Case Type:	Other negligence/pers injury/pro

Tracking Deadlines

TRK:	F	Discovery:	09/04/2005
Service Date:	02/06/2005	Disposition:	01/02/2006
Rule 15:	04/07/2005	Rule 12/19/20:	04/07/2005
Final PTC:	11/03/2005	Rule 56:	10/04/2005
Answer Date:	04/07/2005	Jury Trial:	YES

Parties Involved

8 Parties Involved in Docket: ESCV2004-02042

Party Involved:		Role:	Alias defendant name
Last Name:	Bently Nevada Corporation	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			

Party Involved:		Role:	Alias defendant name
Last Name:	Bently Nevada Corporaton LLC	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			

Party Involved:		Role:	Alias deft name
Last Name:	Bently Nevada Corporation	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			

Party Involved:		Role:	Alias deft name
Last Name:	Bently Nevada Corporaton LLC	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			

Party Involved:		Role:	Alias plaintiff name
Last Name:	PG&E National Energy Group Inc	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			

Party Involved:		Role:	Defendant
Last Name:	Bently Nevada LLC	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			

Party Involved:		Role:	Defendant
Last Name:	Bently Pressurized Bearing Company	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			

Party Involved:		Role:	Plaintiff
Last Name:	USGEN New England Inc	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			

Attorneys Involved

3 Attorneys Involved for Docket: ESCV2004-02042

Attorney Involved:		Firm Name:	HARE01
Last Name:	Kelley	First Name:	Kathleen A
Address:	160 Federal Street	Address:	23rd floor
City:	Boston	State:	MA
Zip Code:	02110	Zip Ext:	1832
Telephone:	617-330-5000	Tel Ext:	
Fascimile:	617-330-1996	Representing:	

Attorney	Firm Name:	RIEM01
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Involved:

Last Name:	Valle Jr	First Name:	Joseph R
Address:	3 Center Plaza	Address:	
City:	Boston	State:	MA
Zip Code:	02108	Zip Ext:	2003
Telephone:	617-523-9000	Tel Ext:	3429
Fascimile:	617-880-3456	Representing:	

**Attorney
Involved:**

Last Name:	Valle Jr	Firm Name:	RIEM01
Address:	3 Center Plaza	First Name:	Joseph R
City:	Boston	Address:	
Zip Code:	02108	State:	MA
Telephone:	617-523-9000	Zip Ext:	2003
Fascimile:	617-880-3456	Tel Ext:	3429
		Representing:	

Calendar Events

No Calendar Events found for Docket: ESCV2004-02042.

There are currently no calendar events associated with this case.

Full Docket Entries

28 Docket Entries for Docket: ESCV2004-02042

Entry Date:	Paper No:	Docket Entry:
11/08/2004	1	Complaint & civil action cover sheet filed
11/08/2004		Origin 1, Type B04, Track F.
11/08/2004	2	Plaintiff USGEN New England Inc's MOTION for appointment of special
11/08/2004	2	process server Applebaum & Applebaum, Constables
11/08/2004		MOTION (P#2) ALLOWED (Richard Welch, III, Justice) Notices mailed
11/08/2004		November 08, 2004
11/22/2004	3	SERVICE RETURNED: Bently Pressurized Bearing Company(Defendant)
11/22/2004	3	service on 11/15/2004 by In hand to: Allison Liberto, service
11/22/2004	3	process person in chare at time of service Filed 11/22/2004
11/22/2004	4	SERVICE RETURNED: Bently Nevada LLC(Defendant) service made on
11/22/2004	4	11/18/2004 by In hand to: Stephen Sperchelozzi, Research Precision

11/22/2004	4	Corporation Svs registered agent person in charge at time of
11/22/2004	4	service. Filed 11/22/2004
11/29/2004	5	Plaintiff USGEN New England Inc's MOTION to admit William T. Sebesta
11/29/2004	5	and Brook F. Minx as counsel Pro Hac Vice for USGEN New England Inc,
11/29/2004	5	declaration of William T. Sebesta in support motion for admission Pro
11/29/2004	5	Hac Vice, declaration of Brook F. Minzxx in support motion for
11/29/2004	5	admission Pro Hac Vice. filed 11/24/04
12/01/2004		MOTION (P#5) DENIED for failure to comply with rule 9A. (Richard
12/01/2004		Welch, III, Justice) Notices mailed December 01, 2004
12/02/2004		Case selected for review pursuant to ST.1996.c358,s.5
12/02/2004		One Trial case upon review of judge, the case remains in Superior
12/02/2004		Court. (Richard Welch, III, Justice)
12/21/2004		Case REMOVED this date to US District Court of Massachusetts filed
12/21/2004		12/17/04
12/21/2004	6	Notice for Removal to the United States District Court filed by
12/21/2004	6	Bently Nevada LLC, Bently Pressurized Bearing Company filed 12/17/04
12/21/2004	6	docket #04-12629 RWZ
